



October 30, 2002

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2002-6170

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170759.

The Texas Department of Human Services (the "department") received a request for 1) all notes, e-mails, and correspondence relating to investigations of a named department employee for abuse of state equipments/resources; 2) a copy of the employee's personnel file; and 3) a copy of the employee's telephone logs from July 1, 1999 to the present. You advise that you will release some of the requested information. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the department employee who is the subject of the request for information made an election under section 552.024 prior to the department's receipt of the request for information, we agree that the department must withhold the home address, home telephone number, social security number, and family member information it has marked under section 552.117 on behalf of the former employee, except as noted below. However,

the department may not withhold this information if the employee failed to make an election under section 552.024 prior to the department's receipt of the request for information. There is some additional information that you have not marked, that you must also withhold under section 552.117 if a timely election was made. We have marked this information for you.

We note that the submitted documents include the employee's personal post office box number and work telephone number. Because this address and telephone number are not the employee's current or former "home address" and "home telephone number," respectively, this information is not made confidential by section 552.117 if that exception applies, and may not be withheld on that basis. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) ("The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985).") (Emphasis added.))

If the employee's social security number is not excepted under section 552.117, it may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 of the Government Code¹ in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the employee's social security number is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that it was not obtained or is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Furthermore, a W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). We therefore agree that the department must withhold the submitted W-4 form under section 552.101 in conjunction with federal law.

¹ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Section 552.101 also encompasses information protected by the common-law right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from the public under common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.*, 540 S.W.2d at 685; *see also* Open Records Decision No. 611 at 1 (1992). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial choices concerning insurance, designation of beneficiary of employee's retirement benefits are generally confidential), 545 (1990) (common-law privacy protects personal financial information pertaining to voluntary financial decisions and financial transactions not involving public funds). We agree that the financial information you have marked is confidential and must be withheld under section 552.101, with the exception of the information we have marked for release. We have marked some additional information that must also be withheld under section 552.101.

We now address your arguments for withholding the information in the submitted telephone logs. In prior decisions, this office has held that information may also be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy upon a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.*

You have submitted information indicating that the employee's family members received hostile and threatening telephone calls in the past when the employee's telephone records were released. The information also reflects that the employee has been harassed by an individual, against whom he has a protective order, fears assault from this person, and believes the person will harass or harm his family if contact information is released. Based on the totality of the information you provided in this instance, we conclude that you have established the presence of special circumstances sufficient to justify withholding the telephone numbers of the employee's family members. Therefore, the department must withhold these telephone numbers under section 552.101 and common-law privacy. Furthermore, if the employee's home and cellular telephone numbers are not excepted under section 552.117, this information must also be withheld under section 552.101. The remaining information in the telephone logs is not excepted under section 552.101 or section 552.117, and must be released.

In summary, you must withhold the personal information you have marked under section 552.117 if the employee made a timely election under section 552.024, apart from the information we have marked for release. You must also withhold the additional

information we have marked pursuant to section 552.117 if that provision applies. If section 552.117 does not except the employee's social security number, it may nevertheless be confidential under section 552.101 and the federal Social Security Act. You must withhold the financial information you have marked pursuant to section 552.101 and common-law privacy, with the exception of the information we have marked for release, and you must withhold the additional private information we have marked. Finally, you must withhold the telephone numbers in the submitted logs belonging to the employee's family members under section 552.101 and common-law privacy, and must likewise withhold the employee's home and cellular telephone numbers under section 552.101 if section 552.117 does not except this information. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristen Bates".

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 170759

Enc. Submitted documents

c: Mr. Jose Sanchez
c/o Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030
(w/o enclosures)